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No. 90-307

In The

SUPREME COURT OF THE UNITED STATES

October Term 1990

[illegible] A. COUGHLIN, Commissioner, New York State Department of [illegible] Services; STEPHEN DALSHEIM, Superintendent, [illegible] Facility; EUGENE S. LeFEVRE, Superintendent, [illegible] Facility; and HAROLD SMITH, Superintendent, [illegible] Facility,

Petitioners,

-against-

[illegible] BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON [illegible] [illegible]ON HANNON and MARTIN SPENCE, on behalf of all others similarly situated,

Respondents.

RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Other Authority

QUESTIONS PRESENTED

1. Does the decision of the Second Circuit enjoining the Department of Correctional Services (DOCS) from cutting Rastafari inmates' hair in violation of their sincerely held religious beliefs comport with this Court's decisions in Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)?

2. Do the decisions of the courts below precluding petitioners from relitigating the identical issue that they had previously lost in the state courts present an unsettled question of national importance?

STATEMENT OF THE CASE

A. The Religious Belief

Rastafari as a religion was founded in Jamaica, West Indies, following the coronation of Haile Selassie I as Emperor of Ethiopia in 1930. The religion has existed continuously since that time.

It is a fundamental tenet of Rastafari that the hair be neither cut nor combed. As a result, their hair forms into ropelike strands that are called dreadlocks. Dreadlocks are a consecration and a covenant with God. The proscription has its source in the Old Testament, Numbers, ch. 6, and Leviticus, ch. 21. Rastafari believe that these two passages require them to

take the "vow of the Nazarite" never to cut their hair. Dreadlocks are a consecration and a covenant with God.

B. Procedural History

Respondents commenced this action in 1979. While the case was pending, Mr. Lewis and Mr. Overton moved in the state courts to enjoin the initial haircut upon entry into the New York State prison system. Lewis v. Commissioner of the Department of Correctional Services, No. 85-11167 (N.Y. Sup. Ct. Queens Co. 1985), aff'd sub nom. People v. Lewis, 115 A.D.2d 597 (2d Dept. 1985), aff'd, 68 N.Y.2d 923 (1986), Overton v. Department of Correctional Services, 131 Misc. 2d 295 (Sup. Ct. Kings Co. 1986), aff'd, 133 A.D.2d 744 (2d Dept. 1987), appeal dismissed as moot, 72 N.Y.2d 838 (1988). The crux of the Court of Appeals' holding in Lewis is:

> Plaintiff urges that the regulation must be stricken because it does not constitute the "least intrusive means" of satisfying defendant's administrative concern"; defendant contends that the regulation should be upheld because it does not represent an "exaggerated response" to his legitimate penological interests. Both lower courts found that, as to plaintiff, the asserted objective of the regulation in issue could be fully achieved simply by pulling his hair back when the initial identification photographs are taken. This affirmed finding is supported by the testimony of a deputy commissioner in the Department of Correctional Services; and a sufficient showing was not made here of administrative burden. In this instance, therefore, defendant's interest can be readily satisfied without any interference with plaintiff's beliefs. Thus, whichever test is

> adopted, on this record the regulation as applied to plaintiff needlessly infringes on his beliefs, and cannot stand.

While Lewis was pending in the Court of Appeals the District Court issued its preliminary injunction based upon doctrines of issue preclusion. Benjamin v. Coughlin, 643 F.Supp. 351 (S.D.N.Y. 1986).

In June, 1987, petitioners moved to vacate the preliminary injunction on the ground that this Court's decisions in Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), changed the applicable legal standard. The District Court reserved decision on the motion until after trial, and heard evidence on all plaintiff's claims, including the haircut issue.

Based on the evidence presented, the District Court adhered to it's earlier ruling on the preclusion question, and held that respondents satisfied their burden under Safley/Shabazz. Benjamin v. Coughlin, 708 F.Supp. 570 (S.D.N.Y. 1989). The Court of Appeals affirmed. Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990).

C. The Trial

In a four day bench trial the District Court heard testimony of several class members, including Messrs. Lewis and Overton. The court viewed photographs of Messrs. Lewis and Overton with their hair tied back, as well as hundreds of photographs

introduced by petitioners, of prisoners both before and after their initial haircut.

Deputy Commissioner Coombe testified in both Benjamin and Lewis. He contradicted himself several times, and contradicted testimony that he gave in Lewis. He also contradicted testimony that he gave in Fromer v. Scully, 649 F. Supp. 512 (S.D.N.Y. 1986), aff'd, 817 F.2d 227 (2d Cir. 1987), vac. and remanded, 484 U.S. 909 (1987), on remand, 837 F.2d 1086 (2d Cir. 1987), on remand, 693 F. Supp. 1536 (S.D.N.Y. 1988), rvsd., 874 F.2d 69 (2d Cir. 1989), that, together with fingerprints, it is a person's facial structure that is the primary means of identification. Based on the photographs, and it's observation of Commissioner Coombe, the court found his testimony unpersuasive. That finding should not be disturbed on appeal.

D. The Decisions Below

After reviewing the evidence, including the photograph introduced by both petitioners and respondents and the testimony of Commissioner Coombe, the district court found that tying the hair back is an accommodation that satisfies prison authorities' security concerns. It further found that the accommodation has no more than a de minimis impact on valid penological interests.

The Second Circuit said that "after reviewing the voluminous record and hearing testimony from both Rastafarian inmates and prison officials the district court determined that

pulling plaintiffs' hair back met the purported security needs." Benjamin, 905 F.2d at 576-577. It then held that "tying plaintiffs' hair in pony tails adequately accommodates the interests of prison authorities in revealing an inmate's cranial and facial features." Id. at 577.

The Second Circuit also found that "defendants presented much of the same evidence" to the state courts in Lewis that they presented to the District Court here. Id. at 576. Thus, it found that there was a substantial overlap of evidence and arguments both in courts, citing Restatement (Second) of Judgments sec. 27 comment c (1982), and Koch v. Consolidated Edison Co. of New York, 62 N.Y.2d 548 (1984). Likewise, the district court, in it's decision after trial, found that the same evidence was presented in both cases, and found no reason to alter it's earlier decision on the preclusion question.

Finally, the Second Circuit considered petitioners arguments that this Court's decisions in Safley and Shabazz worked an intervening change in the law. The Court noted that "Lewis considered two levels of scrutiny and found that even under a standard more burdensome to the plaintiffs than the Turner/Shabazz reasonableness standard, plaintiffs would

prevail."[1] 905 F.2d at 576.

ARGUMENT

POINT I

THE COURTS BELOW PROPERLY APPLIED THE DOCTRINE OF ISSUE PRECLUSION.

The first question presented by petitioners for review by this Court is whether the haircut rule satisfies constitutional requirements. However, the Circuit Court also declared the rule invalid under principles of collateral estoppel, and that holding provides an independent basis for the court's judgment affirming the injunction. Therefore, this Court must first find that the collateral estoppel question is deserving of its consideration before considering the petitioner's first question presented.

The Second Circuit found that petitioners were precluded from litigating the initial haircut on three grounds. First, in Lewis and Overton it had a strong incentive, and a full and fair opportunity, to litigate the issue. Second, because those cases were actually litigated to New York's highest court, the policy considerations of U.S. v. Mendoza, 464 U.S. 154 (1984), do not apply. Third, Lewis was decided under an existing standard

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1. The Second Circuit also found that because Lewis went to the New York Court of Appeals, the policy considerations of U.S. v Mendoza 464 U.S. 154 (1984) were satisfied. Petitioners mention Mendoza only in a footnote in their petition.

that was more burdensome to respondents than the subsequent Safley/Shabazz reasonableness standard. In this court, petitioners urge error primarily on the last point, and argue that an intervening change in the law renders issue preclusion inapplicable.

The Second Circuit's decision is in accord with earlier decisions of this Court, and presents no issue of national importance. As petitioners recognize, the question of the preclusive effect to be given to the prior state court judgments is determined by the law of New York. 28 U.S.C. 1738. Thus, the question presented does not affect the entire nation, nor even all of the Second Circuit. This question of New York law can best be answered by the lower courts, who are more accustomed to deciding such questions than is this Court.

The basic rule of collateral estoppel was stated long ago by the Court in Southern Pacific Ry. Co. v. U.S., 168 U.S. 1, 48 (1897), cited in U.S. v. Moser, 266 U.S. 236, 241 (1924):

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, the question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains

unmodified.

This rule has been reiterated and refined in many cases including Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948), and Montana v. U.S., 440 U.S. 147, 153 (1979), where the Court said:

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1, 2-3 (1942); Restatement (Second) of Judgments Sec. 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion).

Issue preclusion applies even if the first case was decided on a different cause of action, Mendoza, Montana, or on an erroneous application of the law.[2] Moser.

Montana was decided thirty-one years after Sunnen and was developed from later precedents, including Parklane Hosiery v. Shore, 439 U.S. 645 (1979). It involved the constitutionality of the Montana gross receipts tax, while Sunnen involved tax liability of separate and distinct transactions for two different

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2. In this context it matters not how the Appellate Division decided Overton. Lewis, having been decided by the Court of Appeals, is the controlling case under New York law. Even if Overton misinterpreted New York law, under the principles discussed herein, issue preclusion applies.

tax years.[3] For that reason the present case is closer to Monta-

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3. At p. 7 of the petition, DOCS purports to quote the statement of the law from Sunnen. That quote is truncated and taken out of context. A full reading shows that it concerns tax liability, and is concerned with preventing tax inequity among similarly situated taxpayers. For instance, they quote the Court as saying:

> The principle of collateral estoppel...is designed to prevent repetitious lawsuits over matters which have...remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous...

while the Court actually said:

> But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. Compare United States v. Stone & D. Co., 274 U.S. 225, 235-236. Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

To apply issue preclusion here will not provide "a fertile basis for litigation confusion" but will grant uniform treatment of all persons who have beliefs similar to plaintiffs.

na than Sunnen.

In Montana the federal government sued twice in the state courts to overturn the gross receipts tax and lost on both occasions. It then brought an action in federal court. The Supreme Court found that the Montana Supreme Court had "decided the precise constitutional claim that the United States advances here." 440 U.S. at 156, and held that it was precluded from relitigating the issue a third time.

Here the same First Amendment issues were raised in the state and federal court proceedings. Deputy Commissioner Coombe testified in both cases about the security concerns of petitioners policy. Photographs were introduced in both cases, although more were introduced by the state in the federal action. Thus, the same basic evidence presented here was first presented to the state courts, and the court decided "the precise constitutional claim," Montana, 440 U.S. at 156, presented here. Petitioners were properly precluded from relitigating the issue. Southern Pacific Ry., Moser, and Montana.

Petitioners argue that because Safley and Shabazz were decided after the New York Court of Appeals decided Lewis, they should not be precluded from litigating the issue in the federal action, citing Sunnen. There, however, the change in the law was unfavorable to the taxpayer, and he argued that preclusion applied. The Lewis court, however, decided the issue under a more

stringent standard than Safley/Shabazz. Those decisions would have had no bearing on the court's decision.

Petitioners here argue that the New York Court of Appeals statement that "whichever test ["least restrictive" or "exaggerated response"] is adopted, on this record the regulation as applied to plaintiff needlessly infringes on his beliefs, and cannot stand", 68 N.Y.2d at 925, is dicta as concerns the exaggerated response test, and was not essential to the decision. Therefore, they say, issue preclusion does not apply. But, the law is otherwise. As the Seventh Circuit said in Schellong v. I.N.S., 805 F.2d 655, 658 (7 Cir. 1986):"...a judgment which is based on alternative grounds is an effective adjudication as to both and is collaterally conclusive as to both." citing Irving National Bank v. Law, 10 F.2d 721, 726 (2d Cir 1926), See also 1B Moore's Federal Practice par. 0.443[5.-1] at p. 782.

Moreover, the Lewis court's holding was not dicta. It had to decide the question under the more strict standard, which the state was arguing applied to the case. If anything, the court's statement concerning application of the "least restrictive means" test was dicta, because it was not necessary for disposition of the case once the court found that under the exaggerated response test the haircut rule was unconstitutional.

The New York Court of Appeals found that the same evidence would support judgment for plaintiff under either stand-

ard. If that evidence satisfied the exaggerated response test, it must of necessity satisfy the Safley/Shabazz test.

POINT II

THE SECOND CIRCUIT'S DECISION CAREFULLY APPLIES THIS COURT'S PRECEDENTS TO THE EVIDENCE IN THE RECORD. THERE IS NO CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

Petitioner's argue that the constitutional issues should be reviewed by this Court for two reasons. First, they state that the Second Circuit failed to follow the appropriate analysis, as set forth in the Safley and Shabazz decisions. Petitioners also claim that the Circuit Court's opinion in this case is inconsistent with decisions rendered by other Circuit Courts. Neither argument justifies petitioners' conclusion that this case is worthy of the Court's review.

A. The Second Circuit correctly followed the Safley/Shabazz analysis

Under Safley/Shabazz, the court must weigh four factors when deciding whether prison policies are unconstitutional. These are: (1) whether there is a valid, rational connection between the regulation and a legitimate governmental interest; (2) any alternative means available to the prisoners for exercising the right; (3) the impact accommodation of the right will have on guards, other inmates and prison resources generally; and

(4) the existence of any ready alternatives for accommodating the right while still satisfying the government's interests.

In its opinion, the Second Circuit noted that its analysis was controlled by the standard set forth in Safley and Shabazz. The court listed all four factors identified in Safley, and applied them throughout its opinion, including those portions of it that are not subject to the instant petition (which dealt with religious services, headgear and diet). Rather than a failure by the court to apply the correct legal standard, petitioners' basic claim is really nothing more than dissatisfaction with the result reached by the court.

Petitioners argue that the Circuit Court did not address the first and third Safley/Shabazz factors. However, the court noted that it was "[a]ccepting the existence of reasonable security concerns", Benjamin, 905 F.2d at 576, thus ruling in petitioners' favor on the first factor. As to the third factor, impact accommodation, although the court did not specifically discuss its application, there is no reason to presume that it was ignored. It is much more reasonable to assume that the court considered the issue and concluded that it did not require reversal of the district court. In this Court, petitioners make no specific argument as to how application of the third factor even applies to this case, much less that it requires a different result from that reached below.

With respect to the second Safley/Shabazz factor, alternative means of exercising the right, petitioners argue that the Second Circuit erroneously looked beyond the bare fact of whether the prisoners were denied all right to practice their religion. However, Safley and Shabazz require a balancing of many criteria, and the extent of the deprivation should be a relevant factor. Those decisions do not hold that petitioners must be absolutely and completely deprived of all opportunity to observe their religion before they can succeed on any free exercise claim. Rather, the court stated that this factor will influence the degree to which the court should exercise deference to the views of the prison officials. Safley, at 90.

Petitioners argue that the court should have deferred to the views expressed by the Deputy Commissioner who testified at trial. However, this Court has never held that such deference must be complete. In Safley, the Court refused to defer to the prison authorities' claim that a ban on inmate marriages was necessary to preserve institutional security. Security claims can be disregarded when there is substantial evidence in the record that officials have exaggerated their response to those concerns. As this Court held in Safley, the existence of obvious, easy alternatives may be evidence that the regulation is *** an 'exaggerated response' to prison concerns." Id. at 90.

This is what occurred in the courts below. Respondents

were able to prove that the alternative procedure of photographing the prisoner with his hair pulled tightly back, away from his face, was adequate to satisfy petitioners' professed need. Such a photograph is as useful as one taken after a haircut in revealing the personal features that are useful in identifying fugitives.

Petitioners incorrectly argue that the Circuit Court placed the burden of proof on them. They rely solely on a statement in the opinion that noted that petitioners' arguments about the inadequacy of the alternative photographs had been rejected by the court. This does not show that the court shifted the overall burden of proof to petitioners any more than did this statement of the Court in Safley: "We are aware of no place in the record where prison officials testified that such ready alternatives would not fully satisfy their security concerns." Id. at 98.

When a prisoner is able to demonstrate the existence of an apparent ready alternative, the prison officials will have to explain why the alternative procedure is not adequate. If they totally fail to rebut the prisoner's evidence, or do so in an unconvincing manner, the court will be justified in holding the challenged procedure to be unconstitutional. However, this does not mean that the prisoner does not bear the ultimate burden of proving that the regulation is not reasonably related to legiti-

mate penological interests.

Petitioners state that the courts below improperly rejected their criticism of the alternative photographing procedure because it was unrebutted. Apparently, petitioners would have the courts blindly defer to any expression of security concerns. This Court's decisions do not go that far.

Although respondents did not call their own security expert, petitioners' witness was subject to cross-examination. Many photographs were used during his testimony, as he attempted to justify petitioners' policy. Respondents also introduced photographs that were shown to the witness, and which they believe demonstrated to the courts below that the alternative procedure suggested by them was equal in utility to that preferred by petitioners. The trial court was able to observe the witness as he testified, and it could properly find his testimony unconvincing. Furthermore, the court can rely on its own common sense in deciding the issues raised, Safley at 98. The trier of fact should be allowed to weigh all of the evidence and reach a reasoned conclusion as to whether the petitioners have exaggerated their response to security concerns.

The decision in this case is not an example of a court's failing to follow the precedents of this Court. The Courts below were well aware of their duties under the Safley/Shabazz standards. They carefully applied the law to the

facts that were presented at trial. This case does not present any important legal question worthy of this court's review.

B. The decision below does not conflict with those from other circuits.

Petitioners attempt to find a conflict with decisions from other circuits by pointing to cases where short hair regulations were upheld in the face of free exercise challenges. However, the cases petitioners rely on all involved markedly different rules than that challenged here. The rules in those cases all prohibited prisoners from growing their hair beyond a certain length during the term of their incarceration. The state interests justifying the adoption of such rules vary considerably from that advanced by petitioners to support their rule.

Petitioners say that a haircut is needed to obtain a picture of what the prisoner looks like with short hair. Petitioners then allow the prisoner to grow his hair to any length. Their stated concern is if the prisoner escapes and cuts off his hair to avoid detection, they will need a picture that can be used to identify him.

This is the only state interest put forward by petitioners. The decision below found that petitioners' interest could be fully protected using the alternative photographing procedure. This holding does not conflict with the decisions cited by petitioners because none of them considered the validity of this particular state interest. Conversely, the state inter-

ests that were raised in those cases are not advanced by petitioners here.

For example, in Pollack v. Marshall, 845 F.2d 656 (6th Cir. 1988), the following justifications were put forth in support of the rule prohibiting short hair: (1) advancing identification, both in prison and in the event of an escape, by making it difficult for a prisoner to change his appearance by cutting his hair; (2) preventing prisoners from hiding contraband in their hair; (3) reducing homosexual activity, on the theory that prisoners with long hair are more attractive; (4) eliminating safety problems around machinery; (5) preventing the clogging of drains with long hair; and (6) preventing infestation of lice. None of these concerns can be raised by petitioners because they allow prisoners to grow their hair to any length following the initial haircut.

Petitioners place particular emphasis on the Pollack court's statement that a person with long hair looks different than he does with short hair. The concern in that case was that a prisoner could suddenly change his appearance by cutting off his hair, so that someone familiar with how he looks would not immediately recognize him. The issue was not whether he could be identified with a certain type of photograph, but whether he would be recognized from memory. Petitioner's rules allow prisoners to change their appearance by cutting their hair, and the

only question is what type of photograph can be used to identify him by someone who does not know him personally.

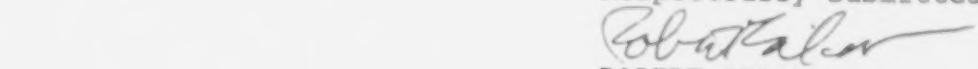
Even if there is a conflict between this case and Pollack, or any of the other cited cases, this would not present the type of conflict that requires resolution by this Court. The conflict would not be on a question of law, but only the application of settled law to similar factual circumstances. The law governing prisoners' free exercise rights is clear, and was recently stated by the Court. It is to be expected that there will be some differences in how separate jurisdictions decide how to apply the law to similar factual circumstances. This is because each case must be decided on the evidence put into the record by the parties. Also, different parties will have different strategies for trying even identical facts, which can legitimately produce varying results. Any "conflicts" produced by this process do not require resolution by this Court.

CONCLUSION

THE PETITION SHOULD BE DENIED.

Dated: September 28, 1990

Respectfully submitted,



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